CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 197

JAMES L. BROOKS

vs.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED OCTOBER 21, 1931.

(28,546)

(28,546)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 591.

JAMES L. BROOKS

vs.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Judd & Detweiler (Inc.), Printers, Washington, D. C., November 25, 1921.

1 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3522.

JAMES L. BROOKS, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona.

Before Gilbert, Ross, and Hunt, Circuit Judges.

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit of Certain Questions of Law to the Supreme Court of the United States under Section 239, Judicial Code.

This cause came to the Circuit Court of Appeals for the Ninth Circuit upon writ of error to the United States District Court
2 for the District of Arizona to review a judgment and sentence rendered in that court on April 15, 1920 against the plaintiff in error, finding and adjudging him to be guilty of violation of Sections 3,258, 3,281 and 3,282 of the Revised Statutes of the United States, and sentencing him to imprisonment in the penitentiary for the term of one year and one day and the payment of a fine of $2,100. The indictment was found on March 30, 1920, and contained four counts, each alleging a violation of the law by the plaintiff in error, committed on January 24, 1920.

The first count charged that the defendant therein did unlawfully and feloniously have in his possession, and under his control, a certain distilling apparatus set up, which was not then in anywise registered with the Collector of Internal Revenue of the appropriate district. The second count charged that the defendant therein did unlawfully and feloniously carry on the business of a distiller without having given bond as required by law. The third count charged that he unlawfully and feloniously did make and ferment a certain mash fit for the production of spirits in a building and on premises other than a distillery duly authorized according to law. The fourth count charged that he did unlawfully and feloniously by distillation separate alcoholic spirits from a certain fermented mash, he not then and there being an authorized distiller.

The questions presented on the writ of error are whether the said offenses defined in said sections of the Revised Statutes have
3 been repealed by the provisions of the National Prohibition Act, (41 St. L., Chap. 305), a question upon which there has been diversity in the Circuit Courts of Appeals, and in the District Courts of the United States.

The questions of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instructions from the Supreme Court are:

1. Are the Revenue Laws of the United States, and particularly the offense defined in Section 3,258 of the Revised Statutes, repealed by the National Prohibition Act, enacted October 28, 1919, and effective from and after January 16, 1920.

2. Is the Revenue Law of the United States, and the offense defined in Section 3281, repealed by said National Prohibition Act.

3. Is the Revenue Law of the United States, and the offenses defined in Section 3282, repealed by said National Prohibition Act.

4. In case it shall be decided by the Supreme Court that the sections of the Revised Statutes above named, and the offenses therein defined, have been repealed by virtue of provisions of said National Prohibition Act, should the United States Circuit Court of Appeals for the Ninth Circuit set aside the judgment and sentence imposed in said cause by the United States District Court for the District of Arizona, and remand said cause to said court, with instructions to enter judgment and impose sentence upon the plaintiff in
4 error herein, in accordance with the provisions of said National Prohibition Act.

WM. B. GILBERT,
ERSKINE M. ROSS,
WM. H. HUNT,
Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: San Francisco, Cal., this 16th day of May, 1921.

Endorsed: Certificate of the United States Circuit Court of Appeals for the Ninth Circuit of certain questions of law to the Supreme Court of the United States, under section 239, Judicial Code. Filed May 16, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

A true copy:
Attest, May 17, 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*,
By PAUL P. O'BRIEN, *Deputy Clerk*.

5 [Endorsed:] No. 3522. United States Circuit Court of Appeals for the Ninth Circuit. James L. Brooks, Plaintiff in Error, vs. The United States of America, Defendant in Error. Certified copy of certificate of the United States Circuit Court of Appeals for the Ninth Circuit of certain questions of law to the Supreme Court of the United States, under Section 239, Judicial Code.

Endorsed on cover: File No. 28,546. U. S. Circuit Court Appeals, 9th Circuit. Term No. 591. James L. Brooks vs. The United States of America. (Certificate.) Filed October 21st, 1921. File No. 28,546.

Supreme Court, U. S.
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WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 197.

JAMES L. BROOKS, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Brief of the Plaintiff in Error upon Questions of Law Presented by Certificate of the United States Circuit Court of Appeals for the Ninth Circuit to the Supreme Court of the United States of America under Section 239 of the Judicial Code.

GEORGE U. TAYLOR,
SAMUEL HERRICK,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 197.

JAMES L. BROOKS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

Brief of the Plaintiff in Error upon Questions of Law Presented by Certificate of the United States Circuit Court of Appeals for the Ninth Circuit to the Supreme Court of the United States of America under Section 239 of the Judicial Code.

Statement of the Case.

This cause is in the Supreme Court on a certificate of the United States Circuit Court of Appeals for the Ninth Circuit under section No. 239 of the Judicial Code, the Circuit Court of Appeals presenting four question of law upon which they desire instructions from the Supreme Court.

This cause came before the Circuit Court of Appeals for the Ninth Circuit upon a writ of error to the United States District Court for the District of Arizona to review a judgment and sentence rendered in that court on April 1, 1920, against plaintiff in error, finding and adjudging him guilty of violation of sections Nos. 3258, 3281, and 3282 of the Revised Statutes of the United States and sentencing him to imprisonment in the penitentiary for one year and one day and the payment of a fine of $2,100.00. The indictment was found on March 30, 1920, and contained four counts, each alleging a violation of the law, committed on January 24, 1920.

The questions presented by the writ of error are whether the said offenses are defined in said sections of the National Prohibition Act (41 St. L., chap. 305).

(Pages 2 and 3 of certificate.)

Brief of Argument.

I.

Questions 1, 2, and 3 of the certificate, as presented to the Supreme Court, may well be summarized as follows: Is the revenue law of the United States, and particularly the offenses defined in sections 3258, 3281, and 3282, repealed by the National Prohibition Act, enacted October 28, 1919, and effective from and after January 16, 1920 (page 3 of certificate).

The revenue laws, and particularly the offenses defined in the foregoing enumerated sections, have been repealed in so far as are concerned intoxicating liquors for beverage purposes by the later National Prohibition Act, an act covering

practically the same offenses, but prohibiting them for a different reason than that of the revenue laws and providing lesser penalties.

II.

Question 4 of the certificate can well be summarized: In event the Supreme Court holds that sections 3258, 3281, and 3282 of the revenue laws and the offenses therein defined have been repealed by the later National Prohibition Act, will the conviction had, under the indictment as drawn under and within the intent and meaning of the revenue laws, support a judgment and sentence under the National Prohibition Act?

(Pages 3 and 4 of certificate.)

A. The counts of the indictment as drawn under the sections of the revenue law do not state any public offense under the provisions of the National Prohibition Law.

B. The conviction under the indictment as drawn under the revenue laws will not support a judgment and sentence under the National Prohibition laws.

ARGUMENT.

I.

Since this cause was certified by the Circuit Court of Appeals the Supreme Court has had before it and passed upon a case "upon all fours" with the present cause.

We cite:

United States of America, plaintiff in error, *vs.* Boze Yuginovich and Cousin Boze Yuginovich, U. S. Adv. Ops., 1920-21, page 679.

This court in the above case held, in sustaining the lower court, that the acts of Congress known as the revenue laws, and the offenses therein described, were repealed by the National Prohibition Act.

The facts in the case cited and the instant case are practically identical; in both instances the defendants were, in the lower courts, indicted under the revenue laws for offenses committed after the National Prohibition Act became effective. The sections of the revenue act under which both indictments were drawn being practically the same. In the case cited the counts of the indictment were based upon sections 3257, 3279, 3281, and 3282 (which sections and the offenses therein described are held, specifically, to be repealed) while in the case at bar the 2d, 3d, and 4th counts of the indictment were drawn under two of the same sections, viz., 3281 and 3282.

(Page 3 of certificate.)

The first count of the indictment in the present case is drawn under section 3258 of the Revised Statutes, also a part of the revenue acts enacted for the same purposes and with the same intent as were the above enumerated sections, and this section (3258) this court must necessarily hold, in following the reasoning and ruling expressed in the case cited, to be likewise repealed by the National Prohibition Law.

This particular section was passed upon in a similar case, in a lower court, and it was held by that court to be so repealed.

We cite:

United States *vs.* Windham, 264 Fed. Rep., 376.

II.

WILL THE CONVICTION UNDER THE INDICTMENT SUPPORT A JUDGMENT AND SENTENCE UNDER THE NATIONAL PROHIBITION LAW?

The purpose of the revenue laws was to protect the Government in the collection of the revenue it derived from its policy of taxing the business of the manufacture of ardent spirits for beverage purposes, and it might well be said that the Government, in a sense, encouraged the manufacture of alcoholic liquors for that reason. This policy was radically changed by the Eighteenth Amendment to the Constitution by prohibiting the manufacture or sale of intoxicating liquors for beverage purposes, the National Prohibition Act, popularly known as the Volstead Act, being passed by Congress to effectuate this prohibition. This court, in the Yuginovich case, has delineated the radical differences in the purposes of the two acts.

The separate counts of the indictment in this case make it evident that the charges of the indictment were made and based upon the provisions of the different sections of the revenue laws and to effectuate the purposes of the revenue laws. They were drawn solely with this act in mind, the charges having relation only to liquors intended for beverage purposes. There was no attempt made to draw an indictment to meet the different provisions of the Volstead Act, and, in view of the entirely different purposes of the two acts, it is self-evident that an indictment drawn under and following the language of the revenue act cannot state or charge an offense under the National Prohibition Act.

A. DO THE COUNTS OF THE INDICTMENT STATE A PUBLIC OFFENSE UNDER THE PROHIBITION ACT?

> "In an indictment all the material facts and circumstances embraced in the definition of the offense must be stated or the indictment will be defective; any essential element of the crime cannot be supplied by implication."
>
> George A. Pettibone *vs.* United States, 148 U. S., 197; 37 Law Ed., 419.

> "The omission of essential averments in an indictment is not cured by verdict."
>
> United States *vs.* Hess, 124 U. S., 483.

Let us examine the indictment from its four corners and ascertain if any of its counts charges any offense under the National Prohibition Law or contains any of the essential elements necessary to constitute a good indictment thereunder.

(I) The first count of the indictment (page 2 of certificate) is based upon section 3258 of the Revised Statutes, which provides for the registration of stills with the collector of the district. This section is directly repealed by the provisions of section 9, title III, of the Prohibition Act, which does not recognize that there can any longer be an authorized distillery, such as is described under the terms of the revenue law; and, as no such authorization as obtained under the old law can be had under the Prohibition Act, this count of the indictment, charging an offense, the failure to do that which the law prohibits to be done, in any event cannot state an offense under the Prohibition Act.

(II) The second count of the indictment (page 2 of certificate) is based upon section 3251, which provides that every person carrying on the business of a distiller of liquor without having given bond as required by this section, or with the intent to defraud the United States of the tax on the liquor distilled by him, is subject to prosecution and punishment; while, by the provisions of the Prohibition Act, the carrying on of this business is absolutely forbidden, and no tax can be paid or provision made for a bond to be given for permission to carry it on for beverage purposes. Hence it follows that this count, charging as an offense the failure to do that which the law specifically says he cannot do, will not state any offense under that law.

(III-IV) The third and fourth counts of the indictment were drawn under section 3282 of the Revised Statutes, which (1) made it penal to *make or ferment* mash *fit* for the production of alcoholic spirits in any building or on any premises other than a distillery, authorized according to law, or (2) for any person, other than an authorized distiller, by distillation to separate the alcoholic spirits from any mash (page 2 of certificate).

Section 25 of the National Prohibition Act, which reads: "It shall be unlawful *to have or possess* any liquor or property *designed* for the manufacture of liquor *intended* for use in violating this title," is the only provision of the Prohibition Act under which an indictment charging an offense of a like or even similar nature could be drawn. It is our contention that, considering the diametrically different purposes and language of the two acts, an indictment drawn under one cannot state an offense under the other.

(III-*a*) The third count of the indictment charged that the defendant therein unlawfully and feloniously did *make*

and ferment a certain mash *fit* for the production of spirits in a building and on premises other than a distillery, duly authorized according to law (page 2 of certificate).

In order to constitute an offense under section 25 of the Volstead Act, it would be necessary to charge that he *had* and *possessed* a certain mash *designed* for the manufacture of liquor and *intended* for use in violation of that act. Property or mash could well be *fit* for use in the manufacture of alcoholic liquors, but, on the other hand, would not be *had* or *possessed* for the *designed* purpose of the manufacture of liquor *intended* for use in violation of any law. It could well be had and used for a perfectly innocuous and legitimate purpose, such as the making of vinegar or industrial alcohol, which substances are, under the provisions of the Prohibition Law, permitted to be manufactured. Further, the defendant was charged with maintaining a species of property—*i. e.*, a distillery—which he, in no event, by complying with any of the provisions of the prohibition law, could be authorized to maintain; and he is again charged in this count with failing to do that which he could not do. The industrial alcohol plant, as authorized by the new act, is a plant entirely different in purpose and design than that which we knew as a distillery under the revenue law.

(III-*b*) The fourth count of the indictment charged that the defendant therein "unlawfully and feloniously did by distillation separate alcoholic spirits from a certain mash, the defendant not there and then being an authorized distiller" (page 2 of certificate).

Here we have the proposition that this alleged separation may have been fully innocent so far as constituting any offense under the prohibition law; the separation might have

resulted in the loss of the alcohol or the alcohol may have been a by-product.

And as the defendant is charged with performing this separation (which is an essential part of the count) in a capacity which is no longer recognized under the present law, we contend that this count also fails to state any offense under the National Prohibition Act.

B. WILL THE CONVICTION UNDER THE INDICTMENT IN THIS CAUSE SUPPORT A JUDGMENT AND SENTENCE UNDER THE PROHIBITION ACT?

> "There can be no legal conviction for an offense unless the act be contrary to law at the time it is committed; nor can there be a judgment unless the law is in force at the time of the indictment."
>
> Sutherland Statutory Construction, page 224.

> "By the repeal of an act without any reservation of its penalties, all criminal proceedings taken under it fall. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence."
>
> United States vs. James Tynen, 11 Wallace, 88; 20 Law Ed., 153.

In the last case cited, there were two acts of Congress, both on the same subject, the last embracing all of the provisions of the first and also new provisions and imposing different and additional penalties. The indictment was drawn under the older act. The court held "that there was no offense remaining for the court to punish, by virtue of that

section," and remanded the case with instructions to dismiss the indictment.

Conclusion.

For the reasons given, and under the authorities cited, we submit that there are two possible courses which this court may adopt:

1. It can instruct the Circuit Court of Appeals to set aside the judgment, sentence, and conviction, with instructions to the District Court of the United States for the District of Arizona to dismiss the indictment and discharge the defendant.

2. Or, inasmuch as, under the warrant of arrest, the act committed would be one for which the party would be liable to indictment or information under the National Prohibition Act, if not under the sections of the revenue act referred to, this court can instruct the Circuit Court of Appeals to set aside the judgment, sentence, and conviction, with instructions to the District Court for the District of Arizona to sustain the demurrer to the indictment.

All of which is

Respectfully submitted,

GEORGE L. TAYLOR,
SAMUEL HERRICK,
Counsel for Plaintiff in Error.